



Citizens Utility Board of Wisconsin, Inc.
Thomas Content - Executive Director

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Public Service Commission of Wisconsin
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June 2, 2022

VIA ERF

Mr. Cru Stublely
Secretary to the Public Service Commission of Wisconsin
4822 Madison Yards Way
Madison, WI 53705

Re: Cost Overrun for the Cardinal-Hickory Creek Transmission Project, Docket No. 5-CE-146

Dear Secretary Stublely:

The Citizens Utility Board ("CUB") writes in response to the May 20, 2022 letter from American Transmission Company LLC ("ATC"), ITC Midwest LLC ("ITC"), and Dairyland Power Cooperative ("Dairyland") (collectively, "the Utilities") informing the Commission of a "more than 10%" increase in the total estimated project cost for the Cardinal-Hickory Creek Transmission Project ("CHC"), Docket No. 5-CE-146 ("Cost Overrun Letter").¹ Reckless spending by powerful for-profit monopoly utilities is not in the public interest. The Commission has the authority, and duty, to shield customers from unreasonable CHC expenditures. CUB writes on behalf of Wisconsin customers to urge the Commission to take necessary action to protect the public from the Utilities' failure to prudently contain costs.

- I. Rather than allow construction to proceed on a project that has no approved route and has speculative cost and benefits, the Commission should halt all CHC construction activities in Wisconsin and reopen Docket No. 5-CE-146 for reconsideration.

"[T]he primary purpose of the public utility laws in this state is the protection of the consuming public." *Wis. Environmental Decade v. Public Service Comm'n*, 81 Wis.2d 344, 351, 260 N.W.2d 712 (1978) (citing *Wisconsin Power & Light Co. v. Public Service Comm'n*, 45 Wis.2d 253, 259, 172 N.W.2d 639 (1969)).

Wis. Stat. § 196.02 confers on the Commission the "jurisdiction to supervise and regulate every public utility in this state and to do all things necessary and convenient to its jurisdiction." Wis. Stats. § 196.39(1) explicitly includes among these the power to "at any time . . . rescind, alter or amend any order fixing rates, tolls, charges or schedules, or any other order made by the commission" and to "reopen any case following the issuance of an order in the case, for any reason."

On January 14, 2022, Judge William Conley of the U.S. District Court for the Western District of Wisconsin issued an opinion and order rescinding the compatibility determination that U.S. Fish and Wildlife Service granted the Utilities to construct CHC through the Upper Mississippi River National Wildlife and Fish Refuge (the refuge).² The order "precludes the CHC transmission line from crossing the refuge by right of way or land transfer."³

¹ Cost Overrun Letter (May 20, 2022) (PSC REF#:438410).

² *Nat'l Wildlife Refuge Ass'n et. al v. Rural Utilities Serv. Et. al.*, No. 21-CV-096-WMC (W.D. Wis. Jan. 14, 2022).

³ *Id.* at 44.

As CUB wrote the Commission previously,⁴ without a connection between Iowa and Wisconsin, CHC cannot deliver the proposed benefits to Wisconsin customers. Such benefits formed the basis of the cost-benefit analysis the Utilities presented in their application to the Commission and upon which the Commission granted CHC a Certificate of Public Convenience and Necessity (CPCN) under Wis. Stat. § 196.491(3).⁵ Without a route or expected benefits, it is unclear at this point what the public purpose of CHC is.

In the over four months since the Utilities received notice that their approved route is illegal, they have continued construction in spite of legal developments that run contrary to their expectation of “changes in the posture of that litigation in the near term.”⁶ On March 22, 2022 the Utilities informed the Commission that they had filed a motion for stay pending appeal with the U.S. Court of Appeals for the Seventh Circuit.⁷ On May 6, 2022, the Seventh Circuit denied the Utilities’ motion to stay the U.S. District Court’s rulings, thereby rejecting the Utilities’ presented argument that they were likely to prevail on the merits of their appeal.⁸ The Court of Appeals set a firm briefing schedule with oral argument likely to be held in September 2022.⁹ The Seventh Circuit Order is attached to this letter.

Each day that CHC-related construction activities take place in Wisconsin, the Utilities incur costs with questionable benefits—costs that will to some extent be borne by the consuming public. As the time period during which the Commission does not act lengthens, costs grow. CUB is therefore again urging the Commission to exercise its authority under Wis. Stats. §§ 196.02 and 196.39(1) to protect Wisconsin customers by halting construction, rescinding the *CHC CPCN Order*, and reopening Docket No. 5-CE-146 to consider under what conditions CHC-related construction may proceed.

- II. The Utilities are neither complying with cost containment best practices nor the law, and the Commission has a duty to act in the public interest to put a stop to the Utilities’ unjust, unreasonable, and imprudent expenditures.

The Utilities’ brief Cost Overrun Letter further evidences a relaxed stance toward spending. It states that the Utilities “have identified that the Project cost at completion will exceed the total estimated cost of \$492,216,000 approved in the Final Decision by more than 10%” but does not specify a current estimated cost of completion. Except for the assurance that CHC costs will likely exceed \$541,438,000, the Commission and the public have no information as to the Utilities’ estimated cost of completion. Furthermore, given that the Utilities currently have no legal path through the refuge, it is unclear what is meant by “completion” in this context. The project is operating without a route, expected benefits, or a cost cap.

⁴ CUB Letter Requesting Reopening of Docket (Jan. 28, 2022) (PSC REF#:430102); CUB Response to Utilities and MISO (March 7, 2022) (PSC REF#:432174).

⁵ See *In Re Joint Application of American Transmission Company LLC, ITC Midwest LLC, and Dairyland Power Cooperative*, Docket No. 5-CE-146, *Final Decision* (Sep. 26, 2019) (PSC REF: 376391) [hereinafter, “*CHC CPCN Order*”].

⁶ See Applicants Response to Requests to Reopen at 4 (Feb. 21, 2022) (PSC REF#:431418).

⁷ Co Owners’ Update Regarding the District Court’s Opinion (March 22, 2022) (PSC REF#:433397).

⁸ See *Nat’l Wildlife Refuge Ass’n et. al v. American Transmission Company LLC, et. al*, No. 22-1347 (7th Cir. May 6, 2022).

⁹ *Id.*

Nor do the Utilities provide an accounting or timeline of the cost increases mentioned in the Cost Overrun Letter. They simply explain that “[t]he anticipated cost increase is primarily driven by material price increases and on-going legal expenses related to multiple challenges to the Project’s federal and state authorizations” and then briefly discuss steel, conductor, and gas insulator prices and “protracted litigation,” for which they assume no responsibility. The Utilities refer to price estimates “used in 2018 when creating the Project’s total estimated cost” but offer no temporal or categorical information on CHC’s budgeting in the years between 2018 and the present.¹⁰ CUB is concerned that if the Commission does not respond to the Cost Overrun Letter, the Utilities will proceed as if the Commission has signed their blank check, and the customers will be forced to pay.

Both the Commission and the Federal Energy Regulatory Commission (FERC) have recently acknowledged the need for better cost containment. In the *Final Decision* for Docket No. 5-BS-254, issued on May 25, 2022, the Commission did away with the 10 percent cushion, instead ordering that “applicants shall promptly notify the Commission as soon as they become aware of” any possibility that costs “may exceed the current estimate” presented in the application.¹¹ The Commission wrote:

In addition to contractual protections intended *to shield ratepayers from unexpected construction cost overruns*, the Commission finds it reasonable to impose reporting conditions *so that cost overruns can be closely monitored and reviewed by the Commission* in future rate case proceedings.¹² (emphasis supplied)

FERC, in a Notice of Proposed Rulemaking (“NOPR”) issued April 21, 2022, notes concern that the benefits of construction-work-in-progress (CWIP) Incentives for transmission projects “may shift too much risk to consumers to the benefit of public utility transmission providers in a manner that renders [FERC]-jurisdictional rates unjust and unreasonable.”¹³ FERC explains that

during the construction of the regional transmission facilities, ratepayers do not receive benefits from the regional transmission facilities, while simultaneously ratepayers directly finance the construction under the CWIP Incentive. Should the regional transmission facilities not be placed in service, then ratepayers will have financed the construction of such facilities that were not used and useful, while ultimately receiving no benefits from such facilities.¹⁴

A separate concurrence explicitly cites the CHC Project changes, pointing out the “consumer protection” concern with the fact that “CWIP is, of course, passed through as a cost to consumers,

¹⁰ The Utilities could provide current estimated costs of completion broken into the same categories as they use in their quarterly progress reports presenting costs-to-date. *See, e.g.*, 1Q2022 Progress Report (Apr. 28, 2022) (PSC REF#:436510).

¹¹ *In re Joint Application of Wisconsin Electric Power Company, Wisconsin Public Service Corporation, and Madison Gas and Electric Company for Approval to Acquire Ownership Interests in the Paris Solar Generating and Battery Energy Storage System*, Docket No. 5-BS-254, *Final Decision* at 18, Order Pt. 7 (May 25, 2022) (PSC REF#:438529).

¹² *Id.* at 13.

¹³ 179 FERC ¶ 61,028 at 259 ¶ 332. Notice of Proposed Rulemaking, Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection. Docket No. RM21-17-000. (2022).

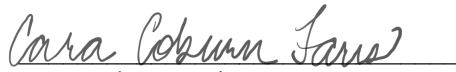
¹⁴ *Id.* at 258-259 ¶ 331.

making consumers effectively an involuntary lender to the developer.”¹⁵ The opinion notes that “[c]onsumers should be protected from paying CWIP costs during this potentially long period before a project actually enters service, if it ever does”¹⁶ and that “states are not just ‘stakeholders’” in regional transmission project planning and cost allocation. Rather,

State regulators have the duty to act in the *public interest* and states alone are sovereign authorities with inherent police powers to regulate utilities through their designated state officers.¹⁷

Ongoing expenditures for a project without a route, expected benefits, or a cost cap is not in the public interest. This spending is unjust, unreasonable, and imprudent, and the Utilities have demonstrated their unwillingness to act in good faith to curb it. For the above-stated reasons, and for the reasons set forth in CUB’s previous two letters to the Commission, CUB urges the Commission to halt all CHC construction activities in Wisconsin and reopen Docket No. 5-CE-146 for reconsideration.

Respectfully,



Cara Coburn Faris
CUB General Counsel



Thomas Content
CUB Executive Director

Cc: Parties (via electronic mail)

¹⁵ Concurring Opinion of Commissioner Mark C. Christie at 6-7 ¶ 15.

¹⁶ *Id.*

¹⁷ *Id.* at 5-6 ¶ 13.

Attachment 1

Nat'l Wildlife Refuge Ass'n et. al v. American Transmission Company LLC, et. al, No. 22-1347
(7th Cir. May 6, 2022).

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen
United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604



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ORDER

May 6, 2022

Before

FRANK H. EASTERBROOK, *Circuit Judge*
DAVID F. HAMILTON, *Circuit Judge*
MICHAEL B. BRENNAN, *Circuit Judge*

DRIFTLESS AREA LAND CONSERVANCY,]	Appeals from the United
et al.,]	States District Court for
Plaintiffs-Appellees,]	the Western District of
]	Wisconsin.
Nos. 22-1347 and 22-1737 v.]	
]	No. 3:21-cv-00096-wmc
RURAL UTILITIES SERVICE, et al.,]	No. 3:21-cv-00306-wmc
Defendants-Appellants,]	
]	William M. Conley,
and]	Judge.
]	
AMERICAN TRANSMISSION COMPANY]	
LLC, by its corporate manager ATC]	
MANAGEMENT INC., ITC MIDWEST LLC]	
and DAIRYLAND POWER COOPERATIVE,]	
Intervenor Defendants-Appellants.]	

The following are before the court:

1. **INTERVENOR-DEFENDANT-APPELLANTS AMERICAN TRANSMISSION COMPANY LLC, ITC MIDWEST LLC, AND DAIRYLAND POWER COOPERATIVE'S MOTION FOR STAY PENDING APPEAL**, filed on March 21, 2022, by counsel for the appellants.
2. **RESPONSE OF APPELLEES NATIONAL WILDLIFE REFUGE ASSOCIATION, DRIFTLESS AREA LAND CONSERVANCY, WISCONSIN WILDLIFE FEDERATION, AND DEFENDERS OF WILDLIFE IN**

OPPOSITION TO APPELLANTS' MOTION FOR A STAY PENDING APPEAL, AND APPELLEES' MOTION FOR AFFIRMATIVE RELIEF UNDER F.R.A.P. 27(A)(3)(B), filed on March 30, 2022, by counsel for the appellees.

3. **INTERVENOR-DEFENDANT-APPELLANTS AMERICAN TRANSMISSION COMPANY LLC, ITC MIDWEST LLC, AND DAIRYLAND POWER COOPERATIVE'S REPLY BRIEF IN SUPPORT OF MOTION FOR STAY PENDING APPEAL**, filed on April 1, 2022, by counsel for the appellants.

4. **MOTION OF PLAINTIFFS-APPELLEES NATIONAL WILDLIFE REFUGE ASSOCIATION, DRIFTLESS AREA LAND CONSERVANCY, WISCONSIN WILDLIFE FEDERATION AND DEFENDERS OF WILDLIFE FOR LEAVE TO FILE REPLY TO INTERVENOR-DEFENDANTS-APPELLANTS' RESPONSE TO MOTION FOR AFFIRMATIVE RELIEF UNDER F.R.A.P 27(A)(3)(B) AND TO FILE SUR-REPLY TO MOTION FOR A STAY**, filed on April 4, 2022, by counsel for the appellees.

IT IS ORDERED that the appellees' motion to file a reply and a sur-reply is **GRANTED**. The panel has considered this filing in resolving the appellants' motion to stay.

IT IS FURTHER ORDERED that the appellants' motion to stay the district court's judgment is **DENIED**. In light of the briefing schedule set on May 5, 2022, the court will attempt to schedule this appeal for argument in September. No extensions of time will be granted absent extraordinary circumstances.